QUARTERLY REPORT

October – December 2000

The **Quarterly Report** provides information to the Indiana State Board of Education on recent judicial and administrative decisions affecting publicly funded education. Should anyone wish to have a copy of any decision noted herein, please call Kevin C. McDowell, General Counsel, at (317) 232-6676, or contact him by e-mail at <kmcdowel@doe.state.in.us>.

In this report:

THE GOLF WARS: TEE TIME AT THE SUPREME COURT

The late James Reston–who won several Pulitzer Prizes for journalism and served in many capacities for the *New York Times*, especially as its Washington correspondent and a widely read columnist–was one of the more influential journalists of the Twentieth Century. He was born in Clydesbank, Scotland, in 1909 but moved to Dayton, Ohio, in 1920. Nicknamed "Scotty," he reported on and commented on a range of topics and occurrences that affected us all. One such comment was structured more as a practical definition:

> Golf: A plague invented by the Calvinistic Scots as a punishment for man's sins.

Etymologists do not agree with Reston's definition but they do agree with the origin of "golf." It is of Scottish origin, possibly from "gowf," meaning "to strike" as with an open hand.[1]

The game of golf has become so enmeshed in the fabric of society, it is not surprising that professional golf is at the center of an important decision to be made by the U.S. Supreme Court, possibly early this summer, regarding the application of the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, to athletic contests.

The case is PGA, Inc. v. Casey Martin, 994 F.Supp. 1242 (Ore. 1998), *affirmed*, 204 F.3d 993 (9th Cir. 2000), *cert. granted*, 121 S.Ct. 30 (2000). Martin, who has a painful circulatory disorder in his leg and cannot comply with the PGA's rule that competitors walk the course, sought the use of a golf cart as a "reasonable accommodation" under the ADA. The 9th Circuit Court of Appeals held that under Title III of the ADA,[2] a golf course is a place of public accommodation while the PGA is conducting a tournament there, and that Martin was entitled to the use of a golf cart as a "reasonable accommodation" under the ADA. Further, the court found that such a "reasonable accommodation" would not fundamentally alter the nature of the professional tournament.

Two questions are presented to the Supreme Court:

1. Whether Title III of the Americans with Disabilities Act, 20 U.S.C. §12181 *et seq.*, regulates standards established for competitors in athletic competition held at places of public

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[1]It is not known when the Scots started using clubs rather than their open hands. It should be noted the author of this article does not play golf and does not understand its apparent addictive abilities. He has observed that adherents of the sport show a marked decline in the ability to conduct simple arithmetic computations.

[2]The ADA addresses three broad yet distinct areas: Employment (Title I); Public Services, which include public schools (Title II); and Places of Public Accommodation (Title III). Under 42 U.S.C. §12181(7)(L), a "golf course" is within the definition of a "place of public accommodation" as a "facility, operated by a private entity, whose operations affect commerce..."

accommodation; and

2. Whether, if so, Title III requires professional sports organizations to grant selective waivers of their substantive rules of athletic competition in order to accommodate competitors with disabilities.

Oral arguments were conducted on January 17, 2001. PGA acknowledged that its tours are "public entertainment" and that the ADA would apply to spectators; but the ADA should not apply to professional golfers "inside the ropes" because the purpose of the competition is to determine who is the best golfer given a "defined set of tasks," which would include walking the course.[3]

Justice Antonin Scalia did not appear to be sympathetic to either party. Although he suggested that sports authorities know best about what constitutes the fundamental rules of a sport, he also noted that baseball pitchers in the American League do not have to take a turn at bat because of that league's "designated hitter" rule. He asked, "Could a pitcher in the National League with a blood disorder say, 'I shouldn't have to bat'?" Later he added, "All sports rules are silly rules, aren't they?"[4]

The U.S. Solicitor General argued in support of Martin, stating that the ADA was meant to be inclusive, covering all athletic contests from Little League to professional tournaments. According to *Education Week*, all sides relied for legal support on a series of cases involving high school athletic associations. Although none of these cases applied Title III, several of the cases cited did apply Title II of the ADA.

Title II and the By-Laws of High School Athletic Associations

Many of the associations that sanction interscholastic athletic competition among participating school districts are not-for-profit corporations that create policies and procedures related to their sanctioning functions. These are usually referred to as "by-laws." Recent state and federal decisions have been refining the nature of these organizations, acknowledging the not-for-profit status but nevertheless determining that the associations are engaged in "state action" that results in higher degrees of judicial scrutiny, especially with respect to eligibility determinations affecting student-athletes[5]

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[3] *Education Week*, January 24, 2001, p. 23.

[4] Id.

[5] See, for example, IHSAA v. Carlberg, 694 N.E.2d 222 (Ind. 1997), *reh. den.* (Ind. 1998), finding that the Indiana High School Athletic Association is a voluntary, not-for-profit corporation and not a public entity but determining that its decisions with respect to student eligibility to participate in interscholastic competition are considered "state action." The Indiana Supreme Court found that the relationship between the IHSAA and its member schools was not "state action" but the relationship of any private organization and those that chose to be members. But see Brentwood Academy v. Tennessee Secondary School Athletic Association, 121 S.Ct. 924 (February 20, 2001), finding that the relationship between member schools and athletic associations constitutes "state action," and the athletic association is a "state actor" for applying Fourteenth Amendment principles. This case will be discussed in the next **Quarterly Report**.

The Indiana General Assembly created the Indiana Case Review Panel (CRP) during its 2000 session.[6] This nine-member panel acts as a state entity with adjudicative authority to review adverse student-eligibility decisions by the Indiana High School Athletic Association (IHSAA) where a parent seeks review by the CRP. In a recent hearing, a student sought a waiver of the "Age Rule" that would prevent her from participating in softball. The IHSAA filed a Motion for Summary Judgment, arguing in part that because the IHSAA's by-laws prevent it from waiving the "Age Rule," the CRP likewise did not have the authority. The CRP, in denying the Motion, advised that, as a state entity, it cannot be dictated to by a private organization. In addition, the CRP must be cognizant of federal nondiscrimination laws that apply to public schools, which the student in this case attended. Although the CRP upheld the IHSAA following hearing on the matter, it nonetheless expanded upon its role vis-a-vis student-athletes attending public schools. The following is from the written decision:

THE LEGAL EFFECT OF THE RESPONDENT'S BY-LAWS

As recited above, the Case Review Panel was created by the Indiana General Assembly under P.L. 15-2000, which is found in the Indiana Code beginning at I.C. 20-5-63-1 *et seq*. The provisions are not entirely without some ambiguity. The State Superintendent of Public Instruction was designated as the appointing authority. I.C. 20-5-63-7(a). Respondent was charged with "all costs attributable to the operation of the panel, including travel and per diem for panel members." I.C. 20-5-63-7(e). After the law was passed, the State Superintendent sought the advice of the Public Access Counselor, as created by I.C. 5-14-4 *et seq.*, as to the exact nature of the Case Review Panel (public entity or private entity). By extension, the State Superintendent asked whether the CRP, if a public entity, was obliged to adhere to the Open Door Act, I.C. 5-14-1.5 *et seq*., and the Access to Public Records Act, I.C. 5-14-3 *et seq*. The Public Access Counselor advised that the CRP was, indeed, a public entity subject to the Open Door Act and the Access to Public Records Act, but that, due to its adjudicative nature, there would be limitations on public access to the proceedings or the record generated therein, where certain state and federal laws regarding the confidentiality of personally identifiable information from a student's educational record are implicated. The Case Review Panel is an extension of the State and not an extension of the Respondent.

Prior to the resolution of the nature of the CRP, the Respondent revised its By-Laws to craft rules for the conduct of the CRP, believing that the legislature intended the CRP to be an extension of the Respondent. For the most part, these

By-Laws reflect the legislative language. See **Rule C-17-10**. However, Respondent

[6]P.L. 15-2000, adding I.C. 20-5-63 *et seq.* to the Indiana Code.

added one provision that is not in the legislative language, to wit:

> The Panel shall be bound by these procedural rules and the substantive rules of the Association when reviewing any final decision of the Association.

Respondent, in its oral argument, indicated that the CRP was bound by this By-Law. The CRP indicated that it is not bound by either the By-Laws addressing the CRP nor by the language of the "Hardship Rule" that proscribes its application to the "Age Rule." However, the CRP added that, because it must conduct its proceedings pursuant to the Administrative Orders and Procedures Act (AOPA), I.C. 4-21.5 *et seq*., it is not free to ignore the By-Laws, especially ones that serve an obvious rational purpose such as the Age Rule, and make student-specific decisions based upon whimsy. The burden remains with the Petitioner to provide substantial evidence that would justify piercing the Age Rule and permitting Petitioner to participate in the particular athletic endeavor that is sanctioned by Respondent.

It is not just the misunderstanding between the nature of the CRP vis-a-vis Respondent's By-Laws but the application of other laws, notably federal laws, that may come into play. Respondent, in its Motion for Summary Judgment, seems to acknowledge that there may be some effect on the By-Laws by the Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq*., as implemented by 34 CFR Part 300 and, in Indiana, through the Indiana State Board of Education's rules and regulations for special education at 511 IAC 7-17 *et seq*. ("Article 7"). This, however, is a law regarding the provision of special education and related services to students with disabilities. This is not a civil rights law, nor does it include all students with disabilities. The principal federal non-discrimination laws affecting students with disabilities who are enrolled in Indiana public schools are Sec. 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, as implemented by 34 CFR Part 104, and the Americans with Disabilities Act of 1990, Title II of same. 42 U.S.C. §12101 *et seq*.

The vast majority of Respondent's member schools are publicly funded schools. In this case, Petitioner attends a public school that receives federal funds for educational purposes. As a recipient of federal educational funds, Petitioner's school must ensure that it complies with Section 504 and Title II of the A.D.A.[7] This includes providing access to its programs and services, as well as providing reasonable accommodations or modifications when necessary to do so. This would include athletics. See, for example, 34 CFR §104.37(c). A recipient cannot avoid its responsibility by entering

[7]The analysis herein will refer to the regulatory scheme for implementing Sec. 504. The effect of Sec. 504 and Title II, A.D.A. will be the same for a public school with respect to this issue. For the applicable definition for "recipient," see §104.3(f).

into a contract with a third party or otherwise delegating a responsibility to a third party non-recipient through licensing or other similar arrangements. See §104.4(a), (b). The Petitioner, in order to prevail, would have to show that she has a substantial limitation on a
major life activity, §104.3(j), and that she is a "qualified person with a disability" under §104.3(k).

Respondent's "Age Rule" has already been found to bear a rational relationship to legitimate interest: (1) protect the health and safety of young student athletes; (2) foster competition; and (3) eliminate "redshirting." Thomas v. Greencastle Comm. Sch. Corp., 603 N.E.2d 190, 193-94 (Ind. App. 1992). The court in Thomas found that the "Age Rule" did not employ suspect criteria that would target any identifiable group. The court also acknowledged that "There will always be people who fall minutes, even seconds, outside of the established [time] line." At 194. Although Thomas involved a student with a learning disability who was retained in the second grade, the implications of federal law were not involved in the decision. For that reason, other sources are visited for guidance in this regard.

The Office for Civil Rights (OCR) of the U.S. Department of Education enforces all anti-discrimination laws where a recipient of federal education funds is involved. This includes Sec. 504 and the A.D.A., Title II. OCR has issued several policy directives with respect to athletic competition dating from 1978. With respect to "Age Rules," OCR has indicated that such rules are based upon physiological principles and are not discriminatory *per se*. California Department of Education, *Education of the Handicapped Law Report* (EHLR) at 257:239 (OCR 1981); Maine Department of Educational and Cultural Services, EHLR at 258:31 (OCR 1985). However, a recipient's past failure to timely identify a student's disability and provide appropriate educational services, which in turn results in a student's present disqualification from participation in interscholastic sports, could result in a present discriminatory effect, thus prohibiting the recipient from abiding by the age limitation by-law. OCR Policy Interpretation No. 5, EHLR at 251:03 (OCR 1978); New Mexico State Department of Education, 18 *Individuals with Disabilities Education Law Reporter* (IDELR) 219 (OCR 1991).[8] Also see OCR Policy Construction *OSPR I/1/47*, EHLR at 259:06 (OCR 1979), noting that although OCR had no enforcement authority over a non-recipient athletic association, OCR did have enforcement responsibilities with

[8]In Maine, OCR held that the association's "Age Rule" was neutral on its face and its purpose–to prevent older, more experienced athletes from gaining an advantage over younger athletes in contact sports–was legitimate and non-discriminatory. OCR added that such an ostensibly neutral and non-discriminatory rule would be upheld except where it is shown that past discrimination resulted in the student presently being over the age limit. The evidence did not support such a finding in this instance.

respect to the member high schools that were recipients. In this case, an "Age Rule" was involved.

> The rule of the State high school athletic association is neutral on its face and, therefore, is not *per se* discriminatory. Its effect in particular situations, however, may be. If the reason that a particular student is nineteen years old at the beginning of his or her senior year is that the school system discriminated against that student on the basis of handicap, the rule may not be applied to that student. For example, it would be discriminatory for a high school to deny interscholastic athletic opportunities to a deaf person who was over the age limit if the reason that the person had passed this limit was that the school system required all deaf students to repeat the first and second grades.

There have been a number of judicial determinations in this respect. One of the more recent and expansive treatments of an association's "Age Rule" and allegations of discriminatory effect can be found at Sandison v. Michigan High School Athletic Ass'n, Inc., 64 F.3d 1026 (6th Cir. 1995). In this case, students who had been retained earlier in their school careers for unspecified learning disabilities found themselves unable to compete in interscholastic sports sanctioned by Michigan's athletic association. Plaintiffs asserted that the Age Rule, which is more restrictive than Respondent's version, resulted in a present discriminatory effect. The 6th Circuit Court of Appeals rejected their claims under Sec. 504 and the A.D.A., finding that the age restriction was applied to all students, with or without disabilities, and that the requirements of Sec. 504 and the A.D.A. were to ensure equal opportunities to participate in athletics. Waiving the Age Rule would not be a reasonable accommodation, the court found. This was a much-publicized case. Although it is not binding upon the CRP, the decision is instructive in the method of analysis utilized by the court.

There have been other cases that are likewise instructive, although one should be cautioned that each decision is fact sensitive. See, for example, Dennis v. Conn. Interscholastic Athletic Conference, 913 F.Supp. 663 (D. Conn. 1996), granting an injunction to permit a student with a disability to compete in swimming notwithstanding his inability to satisfy the Age Rule. The failure to waive the Age Rule for this student, the court found, violated Sec. 504 and the A.D.A. Such a waiver would be a reasonable accommodation. Other cases finding in favor of the student include Pottgen v. Missouri State High School Activities Assoc., 857 F.Supp. 654 (E.D. Mo. 1994), reversed on other grounds, 40 F.3d 926 (8th Cir. 1996), finding the student had demonstrate a hardship such that the Age Rule should be waived; University Interscholastic League v. Buchanan, 848 S.W.2d 298 (Tex. App. 1993), finding for

students with learning disabilities, noting that this disinclination of the organization to recognize exceptions to its Age Rule failed the "reasonable accommodation" requirements of non-discrimination laws; Johnson v. Florida High School Activities Assoc., Inc., 899 F.Supp. 579 (M.D. Fla. 1995), applying a case-by-case analysis, as urged by other courts, and finding that the possibility of waiving the Age Rule is a form of reasonable accommodation; and Tiffany v. Arizona Interscholastic Ass'n Inc., 726 P.2d 231 (Ariz. App. 1986), finding that the association's failure to consider hardship for a student who did not satisfy its Age Rule was unreasonable, arbitrary, and capricious.

Cases that have upheld the Age Rule, besides Sandison *supra*, include M. H. Montana High School Ass'n, 929 P.2d 239 (Mont. 1996), where the student did not demonstrate he was a "qualified" person with a disability in order to invoke discrimination analysis and application.

As a result of the above–and cognizant of the State entity status of the CRP–the CRP cannot be restricted in its student eligibility decisions to limitations the Respondent places upon itself. Indiana law does not require such restrictions and did not authorize Respondent to place such restrictions on the CRP. A properly presented case could result in a waiver of the Age Rule by the CRP.

The CRP was, of course, applying Title II and not Title III of the ADA. Although as noted *supra,* Title III includes a "golf course" in the definition of a "place of public accommodation" as "a facility, operated by a private entity, whose operations affect commerce...," this definition also includes "a gymnasium, ... bowling alley, golf course, or other place of exercise or recreation." The IHSAA and its member schools often lease golf courses, gymnasiums, stadiums, and similar arenas for special tournaments, including state finals. Should the Supreme Court uphold the 9th Circuit's decision in favor of Martin, athletic competition "inside the ropes" could be altered significantly.[9]

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[9]There is federal district court decision that addressed Title III of the ADA prior to the Casey Martin dispute. In Elitt v. USA Hockey, 927 F.Supp. 217 (E.D. Mo. 1996), the federal district court denied injunctive relief sought by the plaintiff and found requested modifications to be unreasonable. The plaintiff was a child with several disabilities. He communicated at the level of a five to six year old. At the time of the court's decision, he was fourteen years old. The plaintiff had participated in the USA Hockey program for several years. However, as the complexity of the game increased, his degree of success decreased. The parents requested certain modifications, including permitting one of his brothers or his father to remain on the ice during scrimmages and allowing him to "play down" in younger, less competitive age groups. Other teams would not play the plaintiff's team if other non-players were on the ice during competition. Insurance coverage would not be available if he were to "play down" in younger age groups, where he would be considerably bigger than the other participants. The court found the placing of one of the plaintiff's brothers or his father on the ice during the competitive phase of the hockey program would be an unreasonable modification because it would "fundamentally alter the nature of scrimmages, an important part of the house program. ...[T]heir presence would disrupt the flow of play

"Casey" Strikes Out in the 7th Circuit

While Casey Martin's case was winding its way through the Oregon federal district court and the 9th Circuit Court of Appeals, a remarkably similar case arose in South Bend. Ford Olinger, a professional golfer certified by the Professional Golfers Association (PGA), has bilateral avascular necrosis, a degenerative condition that significantly impairs his ability to walk. He wanted to participate in the United States Open ("American's greatest–and most democratic–golf tournament," according to the 7th Circuit Court of Appeals). In order to do so, he had to play in a qualifying round. One of the qualifying rounds was scheduled for South Bend on a course sanctioned by the United States Golf Association (USGA), a private, not-for-profit association of member golf courses. The USGA conducts championships annually in thirteen (13) different categories and is generally recognized as the governing body of golf in the United States. Olinger sought a waiver of the rule that he walk the course. Like Martin, he wanted to use a golf cart as he competed in the qualifying rounds. The USGA declined, arguing that the ADA does not apply to its tournament and, assuming that it did, the use of a cart would "fundamentally alter the nature" of the tournament.

The Federal District Court for the Northern District of Indiana found in favor of the USGA, concluding that the nature of the competition would be "fundamentally altered" if the walking rule were eliminated because it would remove stamina of the golfer from the set of qualities being tested in the competition at this level (referred to sometimes as the "fatigue factor"). The 7th Circuit Court of Appeals upheld the federal district court in a decision that is not only the opposite of the 9th Circuit case presently pending before the Supreme Court but unusual in the detailed history of the game of golf.[10] Olinger v. U.S. Golf Ass'n, 205 F.3d 1001 (7th Cir. 2000).

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and prevent players from experiencing conditions of a regular scrimmage." Permitting the plaintiff to "play down" would, likewise, be an unreasonable modification because it would "fundamentally alter the ...program. U.S.A. Hockey's age levels are important because they group players who are roughly the same skill and size. As stated above, [plaintiff] has focusing problems and would generally be larger than the average Squirt player. These two factors would increase the chances of accidental collision as well as the risk of injury to younger and smaller-sized children. In short, [plaintiff's] participation in the lower age group would be too disruptive, thus fundamentally altering the...program." The court also found that his playing in the lower age group "would be unreasonable as an undue financial and administrative burden" due to insurance liability. The court also noted that the plaintiff was not denied access to a "public accommodation," which, in this case, was the ice rink. Membership in organizations (i.e., USA Hockey) is not covered by Title III of the ADA. "[M]embership in organizations are not sufficiently similar to any of the listed private entities...to justify their inclusion as places of public accommodation."

[10]The 7th Circuit's opinion was authored by Terence T. Evans, an obvious golfing enthusiast. The opinion is so unusual in its rhapsodizing about golf that the usually staid William F. Harvey, Professor of Law Emeritus at the Indiana University School of Law–Indianapolis, writing in the January 2001 edition of *Res Gestae* commented as follows on the Olinger opinion: "For a court opinion, *Olinger* has an outstanding history of the game [of golf], full recognition of the great masters who have played and continue to play it, beautiful footnotes that are informative, careful and praising treatment of Mr. Olinger, interpretations and a conclusion that are irresistible, and an explanation of the function and rules of the U.S. Golf Association that is commendable. Whether the U.S. Supreme Court will do as well as the 7th Circuit in *Olinger* is not a proposition for which this writer would give strokes to anyone." At 41.

There is even a history of the golf cart. At 1003.
The 7th Circuit specifically mentioned the Casey Martin case, noting that it was not binding on it. At 1003-04. It noted that a "golf course" under Title III of the ADA can be both a place of public accommodation and a place that is not fully subject to Title III. That is, a golf course employed in a USGA-sanctioned event can be a "mixed use" facility where those "outside the ropes" (spectators) are afforded the considerations under Title III but not the competitors who are "inside the ropes" where the actual competition occurs and access is tightly restricted and not open to the public. At 1004-05. Expanding upon this theme, the court added that a "mixed use" facility analysis would be more logical, especially where professional sports are involved: "[P]laces like Green Bay's Lambeau Field and Chicago's Wrigley Field would be 'mixed use' facilities. Although they would be subject to the ADA in general, their actual fields of strife–where Packers battle Bears and Cubs play Cardinals–would not be places of public accommodation under the ADA." At 1005.

Notwithstanding the "mixed use" discussion, the 7th Circuit decided the matter on a more narrow basis: allowing Olinger to use a golf cart during tournament play would fundamentally alter the nature of the competition. Although Title III of the ADA requires reasonable modifications where necessary to afford individuals with disabilities access to services provided by the entity, this is not required where it can be shown that such modifications would fundamentally alter the nature of the goods or services. Id., citing 42 U.S.C. §12182(b)(2)(A)(ii). Under both Sec. 504 and the ADA, entities are not required "to change their basic nature, character, or purpose insofar as that purpose is rational, rather than a pretext for discrimination." Id., citing cases involving high school student-athletes and their respective athletic associations.

For professional golfers engaged in competition, the point of the competition is to determine which golfer can perform an assigned set of tasks better than other competitors given the same or similar conditions. This would include the mental stress of golfing as well as the physical stress of toiling under varying weather conditions with the accompanying "fatigue factor." At 1006. The court relied heavily upon the testimony of Ken Venturi, the winner of the 1964 U.S. Open,
who testified about the physical and mental fatigue one experiences and how a uniform set of rules for all golfers is an integral part of championship-level golf.[11]

As an alternative theory, the 7th Circuit agreed with the district court that the USGA would experience administrative burdens should it be required to consider every waiver request from the walking requirement. The USGA "would need to develop a system and a fund of expertise to determine whether a given applicant truly needs, or merely wants, or could use by does not need, to ride a cart to

[11]As noted *supra*, the judge authoring this opinion is an obvious enthusiast. Although the court acknowledged the persuasive effect of Venturi's testimony, the following aside appears in the written opinion: "when asked his score during the trial, Venturi replied 'a 66' but, like all golfers, he could not leave it at that, for he added 'with two small misputts. I 3-putted from 12 feet at 17 and missed a 3-footer at 18.'"

compete." This, the court believed, should be unnecessary. At 1007.[12]
Professor Harvey, in commenting on Olinger, acknowledged that the 7th Circuit's opinion "is endangered by the potential of *Martin* in the Supreme Court." *Res Gestae* at 41. Notwithstanding this, Professor Harvey offered the following: "If the reader (a) likes, or (b) enjoys, or (c) worships the game of golf (or even if you are not familiar with the world's greatest game), but grow weary of reading court opinions, statutes, rules, regulations, or that awful and terrible black hole known as the *Federal Register*, which no normal person would read for less than a severe beating each day over several days, then the *Olinger* opinion is for you. At any hour of the day or night, it gives relief from all pain, whether courts, clients, or other members of the law firm." Id.

A Stew About "Mulligan"

Golf seems to be on the mind of all the jurists lately. In Wright v. Spinks, 722 N.E.2d 1278 (Ind. App. 2000), *reh. den.* (2000), the court had to wrestle with the meaning of "mulligan." This dispute began when the election committee for the mayor of Linton, Indiana, sponsored the fund-raiser known as the "Jimmy K. Wright 4-Person Scramble" golf tournament. An advertisement offered a $10,000 prize for hitting a hole-in-one on the first hole. In addition to entry fees, tournament organizers also sold "mulligans."[13]

Spinks paid the entry fee and bought at least one "mulligan." At the first hole, Spinks hit his first ball but did not make a hole-in-one. Using his "mulligan," he shot again. This time, he hit a hole-in-one and attempted to claim the $10,000 prize. Wright refused, stating that Spinks did not hit the hole-in-one on his first shot. Wright also argued that a "mulligan" is intended to improve one's position and not to redo a shot. Spinks, through his expert, asserted that a "mulligan" allows a golfer to redo a shot as if it never occurred. At 1279.

> We do not find these statements necessarily contradictory. A golfer could very well

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[12]Olinger may be more important to high school sports than Martin. The USGA's rules are employed by high school athletic associations for interscholastic golfing competition. In Indiana, see **Rule 55** (boys' golf) and **Rule 104** (girls' golf) of the IHSAA's by-laws, both acknowledging that the USGA's rules will govern competition except where there may be conflict between USGA rules and IHSAA by-laws, in which case the by-laws will take precedence.

[13]The court defined a "mulligan" as a "free shot sometimes awarded a golfer when the preceding shot was poorly played." At 1278. Besides the dictionary, the court also cited cases from Texas and Missouri also defining "mulligan." It also cited a federal district court decision from Massachusetts, MacNeill Engineering Co., Inc. v. Trisport, Ltd., 59 F.Supp.2d 199, 200 (D. Mass. 1999), drawing an analogy between golfers who miss on their first attempt and litigants who need to amend their original complaint. Massachusetts is apparently more fanatical about protecting the sanctity of golf than Indiana. **Chapter 48, §55** of its General Laws forbids the manufacture or sale of "explosive golf balls," punishable by fines and as much as a year in prison.

> change the "lie" of the ball from that used on the first shot when he placed it to use his mulligan for the second shot. And neither Wright's nor his pro's statement disputes that the mulligan supersedes the first shot.

Id. A "mulligan," the court concluded, is "a replacement golf shot." At 1280. Because Spinks was not advised that he could not use the "mulligan" to make a hole-in-one on the first hole, when he did so, he met Wright's offer. As a result, Wright owed Spinks $10,000.[14]

UNIFORM POLICIES AND CONSTITUTIONAL CHALLENGES

(This is part of the continuing series on school safety issues affecting the preparation and implementation of emergency preparedness and crisis intervention plans by schools.)

In 1995, the Indiana General Assembly repealed the former pupil discipline laws and replaced them with new provisions. One of the new provisions permitted a local governing body of a public school district to "(1) Establish written discipline rules, which may include appropriate dress codes..." I.C. 20-8.1-5.1-7(a)(1).[15] Popular interpretation of "dress code" includes "uniform policies." Although uniform policies are fairly common in nonpublic schools, such policies in public schools are of fairly recent origin. In Indiana, the latest public school district to consider school uniforms is the Carmel Clay Schools, which is located in a fairly well-to-do suburb north of Indianapolis.

According to a newspaper account,[16] the school district, depending upon a parent survey, will implement a voluntary school uniform at one of its elementary schools next fall. Clothing choices would include khaki or dark blue slacks and shirts with collars in assorted colors. One of the precipitating factors reported in the article was to take the emphasis off of fashion and help students focus on

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[14]The case was a source of amusement around the state. *The Indianapolis Star*, the largest newspaper in the state, ran the story on the front page of its February 1, 2000, edition under the headline "Plaintiff Aces 2nd Court Test in Hole-in-One Battle."

[15]This article will address "uniform policies" and not "dress codes." A "dress code" proscribes the wearing of some item or items, while a "uniform policy" prescribes the wearing of some particular clothing or style of clothing. For previous articles related to this issue, see the following **Quarterly Report** articles: "Dress Codes," July–September: 1995; "Dress and Grooming Codes for Teachers," January–March: 1999; and "Gangs and Dress Codes," October–December: 1995.

[16]*The Indianapolis Star*, Sunday, March 4, 2001, p. B2. In a later article (April 24, 2001), *The Star* reported the school failed to obtain approval from 75 percent of the parents and has abandoned the project. However, three other Indianapolis-area public elementary schools have instituted uniform policies.

academics. This would, in turn, create a more positive school climate and boost school spirit, the elementary school principal said. Parents had expressed an interest in uniforms and had also expressed concern over peer pressure and preoccupation by students with fashion. "We're not dealing with offensive clothing or discipline problems," the principal reported, "but there's a subtle pressure in the building to dress a certain way." The Carmel Clay Schools do have dress codes that set guidelines for acceptable clothing, such as prohibiting the wearing of hats or shirts that advertise illegal substances or display inappropriate messages, but this would be the district's first uniform policy.

Nonpublic and public schools that have adopted and implemented uniform policies have done so for a variety of reasons. The following are reasons provided in several reported cases, although the reasons may vary from school to school:

1. Promotes a more effective climate for learning.
2, Improves Student behavior, including attendance.
3. Increases emphasis on individual personality and achievement rather than outward appearances among students.
4. Increases campus safety and security.
5. Fosters school unity, pride, and a sense of belonging.
6. Eliminates negative distinctions between wealthy and needy children.
7. Eliminates "label competition."
8. Ensures modest dress.
9. Simplifies dressing and preparation for the school day.
10. Minimizes costs to parents.

The Supreme Court Weighs In

In any discussion or dispute involving dress codes or uniform policies, issues involving student free speech and expression rights require recourse to three U.S. Supreme Court decisions that affect any eventual determination. Tinker v. Des Moines Ind. Sch. Dist., 393 U.S. 503, 89 S.Ct. 733 (1969) is the major decision regarding student free speech rights. This is the case that is often quoted for the finding that students do not shed their constitutional rights at the schoolhouse gate. The issue was the wearing of arm bands in protest of the Viet Nam War. This, the court found, was pure speech entitled to protection, especially where there was no showing that the wearing of the arm bands actually caused or was likely to cause any significant disruption within the school.

Tinker was followed by two other major cases that, although originally viewed as refinements or limitations to Tinker, seem more to be the rule rather than the exception. In Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 , 106 S.Ct. 3159 (1986), the Supreme Court determined that school officials could sanction a high school student for using lewd, vulgar, or offensive sexual metaphors during a speech at a school assembly. Public education, the court wrote, "inculcate[s] the habits and

manners of civility." The fundamental value of civility must take into account the sensibilities of others.[17]

The third case is Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 108 S.Ct. 562 (1988), which arose from the school's regulation of the school newspaper. The court upheld the school's actions because school officials could demonstrate a "legitimate pedagogical concern"that provided a rational basis for the action taken (in this case, preventing the publication of certain stories in the school newspaper). The decision also underscores the need for school officials–and not federal judges–to be in a position to make such decisions, especially where the school's resources are implicated.

Constitutional Challenges: First Amendment Free Speech

The usual challenges to uniform policies center on two aspects of the First Amendment (free speech rights, failure to account for religious differences) and the Fourteenth Amendment (liberty interest in making choices of wearing apparel). To date, these have not been persuasive with the courts, especially where the school districts have elicited support from the parents, have considered "opt out" provisions to accommodate religious objections, and have enunciated a rational basis for instituting such policies (the usual reason presently employed is school security, although there are secondary reasons proffered as well).

Canady *et al.* v. Bossier Parish Sch. Bd., 240 F.3d 437 (5th Cir. 2001) is the most recent case challenging a school's uniform policy. The 1997 Louisiana legislature amended its laws to allow school districts to implement mandatory uniforms so long as the schools provided parents with prior written notice of the intent to implement such a policy. In the 1998-1999 school year, the Bossier Parish School Board implemented a uniform policy in sixteen of its schools, primarily to determine whether such a uniform policy would have a positive effect on the learning environment. The results were favorable. As a consequence, the school board implemented the policy district-wide for the 1999-2000 school year. The typical uniform consisted of a choice of two colors of polo or oxford shirts along with navy or khaki pants. The parents were informed by letter of the dress specifications and provided with a list of local vendors supplying the required clothing. An example of the school uniform was displayed at each school.

Several parents filed suit to enjoin the implementation of the policy, alleging violations of their children's First Amendment rights to free speech and failure to account for religious preferences. Further, the parents claimed a Fourteenth Amendment violation of their children's liberty interest to wear clothing of their choice. The school presented evidence of a decline in behavior problems and a rise in test scores since the implementation of the uniform requirement.

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[17]Also see "Dress Codes in the Public Schools: Principals, Policies, and Precepts," *Journal of Law and Education*, January 2000 (DeMitchell, Fossey, and Cobb).

The 5th Circuit found that a "person's choice of clothing may be predicated solely on considerations of style and comfort," nevertheless, "an individual's choice of attire also may be endowed with sufficient levels of intentional expression to elicit First Amendment shelter." 240 F.3d at 440. In order to bring one's dress within the ambit of First Amendment free speech protections, there is a two-prong test that must be satisfied: (1) Is there an intent to convey a particularized message? and (2) Is there a sufficient likelihood that the message intended to be conveyed would be understood by those who viewed it? Id. The court provided several examples of pure speech intertwined with wearing apparel. "A student may choose to wear shirts or jackets with written messages supporting political candidates or important social issues. Words printed on clothing qualify as pure speech and are protected under the First Amendment." Id. "Clothing may also symbolize ethnic heritage, religious beliefs, and political and social views." Id. Citing to Tinker, the court added that "The choice to wear clothing as a symbol of an opinion or cause is undoubtedly protected under the First Amendment if the message is likely to be understood by those intended to view it." At 441. Students often choose their attire to signify social groupings, participation in different activities, and general attitudes toward society and the school environment.

> While the message students intend to communicate about their identity and interests may be of little value to some adults, it has a considerable effect, whether positive or negative, on a young person's social development. Although this sort of expression may not convey a particularized message to warrant First Amendment protection in every instance, we cannot declare that expression of one's identify and affiliation to unique social groups through choice of clothing will never amount to protected speech.

Id. The court then followed with the caveats created by the Bethel and Hazelwood cases. "While certain forms of expressive conduct and speech are sheltered under the First Amendment, constitutional protection is not absolute, especially in the public school setting. Educators have an essential role in regulating school affairs and establishing appropriate standards of conduct." Id. The level of scrutiny applied to the regulation of student expression, the 5th Circuit wrote, depends upon the substance of the message, the purpose of the regulation, and the manner in which the message is conveyed.

The court acknowledged the three categories of regulating student speech: Pure speech where the regulations are directed at specific viewpoints of the students (Tinker); lewd, vulgar, obscene, or plainly offensive speech (Bethel); and student expression related to school-sponsored activities, such as student newspapers and theatrical productions (Hazelwood). The facts in this case, the court noted, do not fit within any of these three categories.

> The School Board's mandatory uniform policy is viewpoint-neutral on its face and as applied. School officials have not punished students for wearing clothing with lewd, obscene, or patently offensive words or pictures. Finally, a student's choice to wear certain apparel to school is neither an activity that the school sponsors or is it related to the school curriculum.

At 442. The 5th Circuit determined that, for the purpose of constitutional analysis, a school uniform policy does not require the scrutiny of Tinker but requires something greater than Hazelwood. It settled upon the three-part test in United States v. O'Brien, 391 U.S. 367 (1968), which analyzes "speech" in light of time, place, and manner. "[T]he School Board's uniform policy will pass constitutional scrutiny if it furthers an important or substantial government interest; if the interest is unrelated to the suppression of student expression; and if the incidental restrictions on First Amendment activities are no more than is necessary to facilitate that interest." At 443.

The court accepted that improving the educational process "is undoubtedly an important interest" of the school board. Id. The school board's stated reasons for implementing the policy–to increase test scores and reduce disciplinary problems–"is in no way related to the suppression of student speech." Id. Although it is true that students would be restricted in wearing what they wish at school, "student's remain free to wear what they want after school hours. Students may still express their views through other mediums during the school day. The uniform requirement does not bar the important personal intercommunication among students necessary to an effective educational system. Id., internal punctuation and citation omitted.

Although the parents asserted the policy failed to account for the wearing of religious attire on days when a student's faith tradition may call for the student to do so, the court declined to address this issue because the parents did not establish that they have standing to raise the issue by demonstrating how the uniform requirement interfered with their right to free exercise of religion. At 445, *n.* 5.

The court was disinclined to entertain the Fourteenth Amendment issue because it had found that the First Amendment provided adequate protection. It was also unpersuaded by the parents' argument that requiring parents to buy uniforms created a significant financial burden on the parents and denied some students the right to a free education as provided by state constitution. The School Board demonstrated that "school uniforms are donated by organizations to the less fortunate." In addition, "[b]ecause uniforms are available at inexpensive retail stores, it is hard to imagine how the purchase of uniforms consisting of a certain color of shirt and pants could be any more expensive than the normal cost of a student's school clothes." At 444.

Phoenix Elementary School Dist. No. 1 v. Green, 943 P.2d 836 (Ariz. App. 1997), *rev. den.* (1997) evolved from the Arizona legislature's 1995 law that empowered public school districts to implement mandatory dress codes. Several months prior to the enactment of the statute, the school district enacted a mandatory dress code for students attending the Phoenix Preparatory Academy, an inner-city middle school. The code was similar to other uniform policies: for boys, shirts of standard colors with collars with no logos; for girls, blouses of standard colors with collars and no logos. Navy blue pants or shorts were required, with girls also having the option of navy blue skirts. The policy would not take effect until the 1995-1996 school year, after the effective date of the aforementioned statute. There would be a phase-in period and continuing education about the uniform requirements, including

the provision of a uniform for a day while parent contact was made. Students who refused to wear the uniform were given the opportunity to transfer to another school, either within or outside the district.

The parents of several students indicated that their children would never comply with the uniform requirement and that they were entitled to "opt out" of its provisions. The school provided transfer papers to the parents, but the parents and their children "marched onto the Academy's campus, entered the classrooms without permission, and distributed literature to other students disparaging the dress code." At 838. The school initiated action to enjoin the parents and students from entering the Academy grounds, which the trial court granted and the appellate court affirmed.[18]

The court noted that the Academy is not a public forum and that the dress code is reasonably related to the legitimate interests of the school board, whose actions were reasonable. In balancing the interests of the students against the need for the dress code, the court determined that the school board's intent to provide a mandatory uniform policy that would benefit the student body as a whole outweighed the freedom of expression rights of the students.[19] The appellate court declined to employ Tinker because "*Tinker* and its progeny are directed at content-based restrictions on speech. In contrast, the evidence shows the School District's dress code is not intended to restrict speech, but is a content-neutral regulation of student dress that the trial court found furthers reasonable policies and goals of the Academy." At 838.

A nonpublic forum, the court wrote, is "one to which the public does not have access and in which the government can impose reasonable time, place, and manner restrictions upon speech in light of the purpose of the forum." At 839. The court added that "[a] school is generally considered a nonpublic forum for purposes of the First Amendment." Id. As such, school officials have great latitude to regulate activities in a manner that is reasonably related to legitimate pedagogical concerns. Id., citing Hazelwood. In this case, the Academy closely monitored non-students who came on campus (including parents). It never had an "open door" policy. It regulated time, place, and manner as to

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[18]There is a strange case arising from Illinois where a parent who opposed the school's proposed dress code, in an apparent attempt to demonstrate students could hide weapons in their clothing no matter what they were required to wear, stood up at a school board meeting and proceeded to pull a black toy gun from her blouse and a pocketknife from her shorts. There were no identifiable characteristics to indicate at first glance that the black pistol was, in fact, a toy. She reportedly told the school board, "If this would have been real, I could have shot any of [you] within the past hour." The board banned her from all school activities–including extracurricular activities–for a year. The court upheld the board's action, finding that the board has the right to regulate the conduct of participants at its board meetings, and its ban on the parent did not abridge her First Amendment free speech rights. Nuding v. Bd. of Ed. of Cerro Gordon Comm. Unit Sch. Dist. No. 100, Piatt Co., Illinois, 730 N.E.2d 96 (Ill. App. 2000), *reh. den.* (2000).

[19]In defiance of the policy, the students had worn T-shirts to school emblazoned with patriotic and religious logos and references.

non-school sponsored activities. The Academy is, as a result, a nonpublic forum.

The school also articulated "legitimate pedagogical concerns" that demonstrated a reasonable basis for implementing the policy: the uniform policy would reduce clothing distractions, increase campus safety, improve school spirit, level socio-economic barriers, ensure students dress appropriately, and reduce staff and faculty time required to enforce appropriate dress. Id. The school's policy did permit students with some alternative avenues for expression, including jewelry, buttons, non-uniform days, and petitions.
Because the school's policy regulates a method and not a message, the court found the dress code was a constitutional regulation on the students' First Amendment speech rights because the regulation was content-neutral and the school was a nonpublic forum. At 840.

Long v. Bd. of Ed. of Jefferson Co., 121 F.Supp.2d 621 (W.D. Ky. 2000) involved the development and implementation of a uniform policy at a high school, following statutory authority to do so. The court lamented at the outset as to the dearth of court direction in this regard.

> This case requires the Court to consider the circumstances under which school officials may regulate student dress to create a particular educational atmosphere and to discourage gang presence in schools. This is a more unsettled question than one might think. Neither the Supreme Court nor the Sixth Circuit have explored fully these precise issues.

At 622. Nevertheless, the court did conclude that the school's dress code fell "within that discretion allowed school officials in regulating the learning environment." Id.

The school-based team created by statute and charged with providing an environment to enhance student achievement and help the school meet certain educational goals, began to research the viability of a dress code and uniform policy. A subcommittee composed of parents and teachers considered anecdotal information, such as students ridiculing other students over their attire, evidence of gang members among the high school population, the presence of gang symbols carved or painted in various locations around the school, and hand signals appearing in yearbook pictures that indicated gang affiliation. The subcommittee eventually recommended a uniform policy that identified the underlying basis as the need to address gangs at the high school, promote student safety, prevent student-on-student violence resulting from disputes over attire, and enable school officials to identify more easily non-students and intruders on campus. Id. The dress code and uniform policy are comprehensive.[20] Violations of the dress code may result in disciplinary sanctions ranging from detention to suspension from school.

The plaintiffs are parents and students who believe the policy will not achieve its stated goals, and who wish to wear shirts with logos of athletic teams as well as other depictions. They claim the dress code

[20]The court reprinted the 1999 and 2000 dress codes as appendices to its opinion. See 121 F.Supp.2d at 628-631.

abridges their First Amendment right to freedom of speech by preventing expressive conduct through the choice of school attire. "Plaintiffs do not seek to express a particular message either directly or indirectly. They merely want the right to wear clothes of their own choosing." At 624.

The court found that the stated purpose of the dress code is unrelated to the expressive nature of the students' choice of attire. There was no evidence that the dress code intended to suppress the particular mode or message of any expressive conduct. The dress code, although an infringement on expressive conduct, is nevertheless a content-neutral method that furthers an important or substantial governmental interest (herein, primarily school security) and is not directed at the suppression of free speech rights. In addition, the policy is styled sufficiently to accomplish the stated goals without unnecessary abridgment of individual rights and liberties. At 625-627.

The court, citing Bethel, noted that a public school is not required to allow the full range of expressive activity a student may enjoy outside of school. At 625. "[T]he very notion of education implies the need to control the atmosphere in which learning occurs." At 626. The court also found that the dress code was reasonable and that the school officials did not seek to suppress speech.

> The Dress Code clearly aims to create a safe and peaceful environment where school officials perceive fewer threats to student safety and school order. Few would dispute that these interests bear a close relationship to the school's educational mission and that this goal is important. [The court acknowledged there may be members of the school community who disagree with the dress code or believe it is not necessary.] However, our courts have traditionally left these types of choices to the reasonable discretion of school officials. Clearly, Defendants have established an objective basis for adopting the Dress Code.

At 627. The court also pointed to the lengthy adoption process as further evidence the dress code was reasonably related to a legitimate educational objective. Id. The court did not find that the school had to prove the actual existence of gang activity or violence.

> It is not entirely clear that a school must find that an actual problem exists before taking action or that a school must undertake the lengthy legislative process undertaken in the present case. School officials must anticipate problems before they arise and must sometimes respond quickly to potential disruptions. On the other hand, students do not lose their First Amendment freedoms at the school house door. For school officials, balancing these sometimes conflicting rights and duties can be a difficult task. Here, they have struck a reasonable balance.

The court summarily dismissed the Fourteenth Amendment challenges alleging denial of due process and equal protection. Minimal due process protections were provided, and the dress code was

gender-neutral. There was neither a discriminatory impact nor a discriminatory purpose. At 628.[21]

Constitutional Challenges: Fourteenth Amendment Parental Rights

The 5th Circuit cited Littlefield *et al*. v. Forney Ind. School Dist.,108 F.Supp.2d 681 (N.D. Tex. 2000), which found that a student's action of wearing clothing of his choice was not expressive conduct protected by free speech clause.[22] As in Indiana and Louisiana, this case begins in 1995 with the state legislature enacting a statute that authorized public school districts to adopt mandatory uniform requirements. The school board explored the possibility of implementing such a uniform policy. Following research, it came to the conclusion that such a uniform requirement in its four schools would improve student performance, instill self-confidence, foster self-esteem, increase attendance, decrease disciplinary referrals, and lower drop-out rates. At 686. The school board surveyed the parents, with 60 percent responding favorably. Public meetings were also conducted where copies of the proposed policy were available for inspection and comment. Eventually, the school board approved the uniform policy and intended to implement it with the beginning of the 1999-2000 school year.

The school district already had a dress code, which had been in effect for several years. The uniform policy required boys to wear khaki or navy blue pants or shorts, and had a choice of white, red, yellow, or blue shirts with collars, either short-sleeved or long-sleeved. Girls had similar color choices, and they could war skirts or jumpers of a prescribed length. Denim, leather, suede, or similar material was not permitted to be worn, except as an outer-garment (i.e., jacket or coat). Students were not permitted to wear clothing in a manner suggesting gang affiliation and manufacturer logos were to be limited in size. Principals could, at their own discretion, designate certain school days as "non-uniform" days. Id. Failure to comply with the policy without an exemption (see *infra*) could result in expulsion or assignment to an alternative school.

The policy did include an "opt out"provision that would permit students, through their parents, to apply for exemptions from the policy based upon philosophical reasons, religious objections, or medical necessity. Parents who objected to the policy were provided questionnaires concerning the basis of

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[21]Plaintiffs also raised an allegation that the dress code and uniform policy violated the Americans with Disabilities Act, but these issues were apparently abandoned. The Office for Civil Rights (OCR) of the U.S. Department of Education did investigate a complaint that a school district violated Sec. 504 of the Rehabilitation Act of 1973 and Title II of the A.D.A. when the school allegedly refused to permit a student with a disability to attend school until he complied with the school's uniform policy. OCR found that the student reported to school 45 minutes early one day and was sent home in order to change his clothes to comply with the school's dress code. He was expected to return to school that day, but he did not return. He also did not return to school for two more days. Neither absence was related to the school's uniform requirements. OCR found the school complied with Sec. 504 and the A.D.A. See Toledo (Ohio) Public Schools, 32 IDELR ¶267 (OCR 2000).

[22]The federal district court in Canady also made this finding, but the 5th Circuit disagreed. See *supra*.

their objections. The questionnaire was intended to elicit information regarding the sincerity of the beliefs of the parents who posed objections. There was also a grievance procedure for considering "opt out" requests. Id. The parents of 72 students sought exemptions, but many refused to complete the questionnaire or initiate a grievance. Twelve (12) students were granted exemptions, but others were denied because their philosophical differences were not considered "bona fide" because the students wore other uniforms in the past (athletic teams, girl scouts, school mascot costume, fast food employment). At 687.

The parents sued the school district, claiming a deprivation of the civil rights of their children, notably of their First Amendment right to free speech "by suppressing the students' expressions of individuality and uniqueness, while requiring them to display a contrary message, namely, conformity, through the visual medium of the uniforms themselves. Additionally, the students complain that the policy impedes their liberty interest in wearing the clothing of their choice while at school." At 689. The parents also complained that the policy interferes with their rights to direct the upbringing and education of their children by unconstitutionally encroaching on their ability to select the clothing worn by their children while at school. Id. There were also allegations that the policy interfered with religious practices and that the questionnaire constituted an unconstitutional intrusion into the plaintiffs' philosophical and religious beliefs.

The court granted the school district's motion for summary judgment, holding that the wearing of clothing by the students did not communicate a message that would have a likelihood of being understood by others as conveying a specific message. As a consequence, the wearing of clothing is not expressive conduct protected by the First Amendment's free speech clause. However, even if the uniform requirement did implicate expressive conduct, the school district enunciated a rational basis for instituting the policy (i.e., to further the legitimate and compelling governmental interest of improving the learning climate of the school). At 690-695.

The questionnaire did not deprive parents and students of a liberty interest to prevent the disclosure of private information under the Fourteenth Amendment. The court did not find that the questionnaire and grievance procedure constituted an unconstitutional intrusion on the private affairs of the students and their parents. Although there is a general recognition that there is a liberty interest in one's privacy, especially from being required to disclose personal matters to the government and the right to make certain decisions without government interference, where government has demonstrated a legitimate need for such information, the privacy right must be balanced against any legitimate interest shown by the government.

> In this case, it is clear that neither the questionnaire nor the grievance procedure compel a constitutionally prohibitive disclosure of personal information. First, Plaintiffs who refused to respond to the questionnaire and did not seek an opt-out through the grievance procedure, did not reveal any information and, thus, their claims have no legal merit. The School Board's request for information, which was ultimately refused by

> Plaintiffs, does not present a constitutional violation. Second, as to those who acceded to the School Board's request and supplied information, the Court concludes that the information provided did not invade their right of privacy. The questionnaire was simply used to elicit minimal information concerning the basis of Plaintiffs' objections to the uniform policy, and it was used only for the purpose of determining whether an exemption was warranted.... Balancing the minimal intrusion on Plaintiffs' privacy interests with the significant interest of the School Board in achieving its educational goals, the Court concludes that Plaintiffs' due process claims arising out of disclosure of personal information must likewise fall.

At 697. The court was unpersuaded that the uniform requirement interfered with the "parental rights" to direct the upbringing and education of the parents' children. "Parental rights" are defined by the context within which they are raised. In this case, the context is a "public school,"which limits scrutiny to a "rational basis" analysis."

> As such, the school uniform policy passes constitutional muster. The Court has previously concluded that the School Board's interest in furthering education is not only compelling, but paramount. [Citation omitted.] The uniform policy is a measure directed toward that end. Clearly then, the policy easily meets the rational basis test. Therefore, it does not unconstitutionally inhibit Plaintiff parents' due process right to direct the upbringing and education of their children.

At 703. The court also found no violation of the plaintiffs' right to freely exercise their religious beliefs.

> Plaintiffs simply contend that the uniform policy is contrary to their religious faith, but do not indicate how the wearing of a school uniform, as contrasted with other clothing, would affect their faith or their practices. As the Supreme Court clearly stated, "We have never held that an individuals' religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."

At 707, citing Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 878-879, 110 S.Ct. 1595 (1990). The uniform policy was a facially neutral, generally applicable regulation that served an unquestioned secular purpose. It did not deprive the students or their parents of their right to freely exercise their religious beliefs nor did it constitute an impermissible establishment of religion. There was no showing that the school board showed preferences when determining exemptions. The granting of exemptions does not entangle the school board in the exercise of any religion.

Constitutional Challenges: Free Exercise of Religion and Parental Rights

Hicks v. Halifax Co. Board of Education, 93 F.Supp.2d 649 (E.D. N.C. 1999) involved a more direct application of one's religious beliefs against a public school's uniform policy. In this case, the school

district, after researching the need for a uniform policy, surveying parental reaction, and conducting public forums, established an ad hoc committee to draft a uniform policy. This committee drafted several policies, including one that had an "opt-out" provision where the wearing of a uniform would violate a student's sincerely held religious beliefs. However, the final policy did not contain such an "opt-out" provision. The school board eventually adopted a mandatory uniform policy that required all elementary school students to wear a school-approved uniform beginning with the 1998-1999 school year. The policy required khaki pants and a blue shirt.

Hicks is a self-described minister and prophetess who believes that adherence to the uniform policy would violate her basic religious rights. Her religious views are influenced to a great extent by the apocalyptic *Book of Revelations* in the New Testament. The wearing of a uniform, to Hicks, "demonstrates an allegiance to the spirit of the Anti-Christ, a being that requires uniformity, sameness, enforced conformity, and the absence of diversity. Hicks does not have a problem with khaki pants and blue shirts in and of themselves. Rather, she objects, on religious grounds, to the fact that all choice and free will have been eliminated and uniformity is required. The uniformity required by the policy is, in her opinion, characteristic of the 'last days' and required by the anti-Christ." At 653. It is her religious duty to oppose the coming of the Anti-Christ and "prevent the programming of our children to accept the Anti-Christ, his orders, and his mark." At 653-54. Hicks is the great-grandmother and legal guardian of a third-grade student, whom she will not permit to wear the uniform. Eventually, the third-grade student was placed on long-term suspension by the school for failure to comply with the uniform policy. His suspension would continue until the end of the school year or until he complied with the uniform policy.

School officials were aware of Hicks' religious views and her objections to the uniform policy before the ad hoc committee was formed. Although they were aware of her objections, they did not appear to understand the depth of her sincerity or the exact meaning of her terminology, especially with respect to the "Anti-Christ." While Hicks attempted to appeal her great-grandson's suspension, she enrolled him in a Christian school where she paid tuition. However, she found it necessary to remove him from that school when it initiated a uniform policy. At 654.

The North Carolina legislature, by statute, authorized its State Board of Education to implement a pilot program employing a uniform policy. Instead, the State Board created guidelines and then authorized public school districts to adopt uniform policies in accordance with these guidelines. The Halifax school district elected to do so. At 655. Although Hicks sought to enjoin the implementation of the policy, the court ruled against her, finding the policy a neutral, generally applicable regulation that did not infringe unconstitutionally upon Hicks' Free Exercise rights. Id. Her suit is based on her allegations that the uniform policy violates her constitutional right to Free Exercise of Religion and her right to direct the upbringing and education of her great-grandson. The school does not contest the sincerity of Hicks' religious beliefs, which is not an issue in this dispute.

As the Supreme Court has held, "religious beliefs need not be acceptable, logical,

consistent, or comprehensible to others in order to merit First Amendment protection.

At 657, quoting Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 714, 101 S.Ct. 1425 (1981). Although facially neutral policies of general application are typically impervious to challenges based upon religious objections, the court in this case characterized Hicks' argument as more than merely a general "parental rights" argument. The argument is really a hybrid-rights claim invoking not only a parent's right to direct the upbringing of one's child but the free exercise right as well.

> ...Hicks' liberty interest may be described as a parent's right to send her child to school without a uniform in contravention of a generally applicable school uniform policy when the parent's actions are necessitated by her effort to direct the child's moral and religious upbringing in a manner consistent with her religious beliefs. At stake in this case is Hicks' ability to impress upon her great grandson the truth and importance of her religious beliefs., specifically those beliefs regarding the preparation for salvation.

At 659. "In other words," the court wrote at 662, "where a parent's free exercise right may not be sufficient to justify an exemption from a neutral, generally applicable law, that right, when combined with the constitutional right of the individual, as a parent, to direct her child's upbringing may be sufficient." For these reasons, the court denied the school's motion for summary judgment, finding that Hicks had presented a genuine claim of infringement of a constitutional interest. Id. The court did not find that the school's long-term suspension of the third-grade student was a violation of the Fourteenth Amendment because it did not rise to the level that the school board's actions "shocked the conscience." However, the court did indicate that it considered the suspension "disturbingly inconsistent with the most basic goals of the public school system." At 665.

DECALOGUE: EPILOGUE

In the "The Decalogue: Thou Shalt and Thou Shalt Not," **Quarterly Report** for April-June 2000, the continuing brouhaha over the various schemes to post the Ten Commandments and circumvent the U.S. Supreme Court's decision in Stone v. Graham, 449 U.S. 39, 101 S.Ct. 192 (1980) was reported. The situation in Indiana became particularly acute following the passage of P.L. 22-2000 by the Indiana General Assembly, permitting the posting of the Ten Commandments (the Decalogue) in various public places, including public schools, so long as the Decalogue is part of a larger display and attention is not drawn unduly to it. A lawsuit was initiated when an attempt was made to display a monument on the State Capitol's grounds bearing, in part, the Decalogue. See Indiana Civil Liberties Union, Inc., *et al.* v. O'Bannon, 110 F.Supp.2d 842 (S.D. Ind. 2000), finding in favor of the plaintiffs.[23] As noted below, this was not the end of the controversy surrounding the monument.

[23]The State appealed to the 7th Circuit Court of Appeals. Oral arguments were conducted on January 9, 2001.

Also during this time, the 7th Circuit Court of Appeals decided Books v. City of Elkhart, reversing the decision of a different federal district court in favor of Elkhart.

Although Stone v. Graham is fairly straight-forward in finding that "[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths...," 449 U.S. at 41, language in a later Supreme Court decision seems to lend support to the position that, in some cases, "context" may override impermissible "content." Allegheny County v. Greater Pittsburgh American Civil Liberties Union, 492 U.S.573, 109 S.Ct. 3086 (1989) addressed whether the presence of a nativity scene on the Grand Staircase in the county courthouse violated the Establishment Clause of the First Amendment. The majority opinion determined, when viewed in its overall context, the crèche's preferential placement amounted to a promotion of a Christian holy day rather than acknowledging Christmas as a cultural phenomenon. Utilizing this contextual analysis, a display of a Jewish menorah did not have the prohibited effect of promoting religion because of its "particular physical setting" along with a Christmas tree and a sign saluting liberty. The Christmas tree, now largely a secular symbol, was the central focus of the display. The overall effect was to acknowledge that Christmas and Chanukah are both part of the same winter holiday season.

Justice John Paul Stevens, in an opinion concurring in part and dissenting in part, provided an example of the "contextual analysis" that has been seized upon by later litigants and legislators attempting to avoid an application of Stone v. Graham:

> For example, a carving of Moses holding the Ten Commandments, if that is the only adornment on a courtroom wall, conveys an equivocal message, perhaps of respect for Judaism, for religion in general, or for law. The addition of carvings depicting Confucius and Mohammed may honor religion, or particular religions, to an extent that the First Amendment does not tolerate any more than it does the permanent erection of a large Latin cross on the roof of city hall. [Citations and internal punctuation omitted.] Placement of secular figures such as Caesar Augustus, William Blackstone, Napoleon Bonaparte, and John Marshall alongside these three religious leaders, however, signals respect not for great proselytizers but for great lawgivers. It would be absurd to exclude such a fitting message from a courtroom, as it would to exclude religious paintings by Italian Renaissance masters from a public museum.

492 U.S. at 652-53. Justice Stevens was describing the friezes on the south wall of the U.S. Supreme Court's courtroom. 492 U.S. at 653, *n.* 13.[24] Oddly enough, the tablets held by Moses, although depicting the outline for the Ten Commandments, contain only four, written in Hebrew, and addressing

[24]The friezes were the work of noted sculptor Adolph Weinman, who drew upon classical sources to depict a procession of great historical lawgivers. Besides those mentioned in Stevens' opinion, the following also appear: Menes, an Egyptian king and lawgiver; Hammurabi, the Babylonian king who developed the Code of Hammurabi; Solomon; Lycurgus, a Spartan legislator; and Solon, an Athenian lawgiver. Each frieze measures 40 feet in length and is 7-feet, two-inches high.

laws with secular counterparts ("Thou shalt not kill"; "Thou shalt not commit adultery"; "Thou shalt not steal"; and "Thou shalt not bear false witness"). Suhre v. Haywood Co., 55 F.Supp.2d 384, 393 (W.D. N.C. 1999).

As noted in the previous **Quarterly Report** article, there are two distinct periods to consider when analyzing Indiana disputes involving the Decalogue.

Prior to Legislative Enactment

In Books v. City of Elkhart, 79 F.Supp.2d 979 (N.D. Ind. 1999), the federal district court upheld the constitutionality of the placement of a monument containing the Decalogue. The monument was donated to the city in 1956 by a fraternal organization. It contains both Christian and Judaic symbols, with the language of the Ten Commandments written in such a fashion as to be inclusive of various translations. The monument sits on the grounds of the Elkhart municipal building. The court applied the three-part test developed through Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S.Ct. 2105 (1971), which invalidates a challenged governmental activity if it fails any one of the three parts: (1) secular purpose; (2) primary effect that neither advances nor inhibits religion; and (3) not foster an excessive entanglement with religion. The first two prongs of the Lemon test are often considered together under an "endorsement" theory.

The federal district court noted the monument was donated as part of a national effort in the 1950's to address moral standards among the youth, and that promoting morality among the youth is a legitimate aim of government and a traditional part of the police powers of the state. There are other monuments on the grounds of the municipal building, thus, when viewed in its overall context, the court reasoned, there would be no perception of endorsement.

On December 13, 2000, the U.S. 7th Circuit Court of Appeals reversed the district court. In Books v. City of Elkhart, 235 F.3d 292 (7th Cir. 2000), the court noted that the monument sat on the municipal grounds for 40 years without controversy. In 1998, the mayor was advised that a suit would be filed unless the monument were removed. The city balked, arguing the monument and its Decalogue had both historical and cultural meaning. The city also asserted the Decalogue has had a significant impact on the development of Western Civilization and reflects one of the earlier codes of human conduct. At 297. The monument itself resulted from the efforts of the Minnesota juvenile court judge, E.J. Reugemer, who initiated the Youth Guidance Program (YGP) in the 1940's. Judge Reugemer had become disheartened by the growing number of troubled youths. He believed they needed a common code of conduct, and the Decalogue would provide such guidance. His original idea was to post the Ten Commandments in his court and, eventually, in courts across the land. Eventually, he contacted the Fraternal Order of Eagles (FOE), a service organization dedicated to promoting liberty, truth, and justice. The FOE was cool to the idea originally, fearing such a project might appear sectarian and coercive. Eventually, with input from various faith traditions, a "nonsectarian" version of the Decalogue was developed. The FOE, with urging from motion picture producer Cecil B. DeMille (who was producing the movie "The Ten Commandments"), then joined in the national campaign to place monuments around the country. 235 F.3d at 294. The Elkhart FOE chapter donated to the city its version of the Ten Commandments' monument in 1958. The actual text of the monument, which is an

amalgamation of Jewish, Protestant, and Catholic translation, reads as follows:

> The Ten Commandments
>
> I AM the LORD thy God.
>
> Thou shalt have no other gods before me.
>
> Thou shalt not make to thyself any graven images.
>
> Thou shalt not take the Name of the Lord thy God in vain.
>
> Remember the Sabbath day, to keep it holy.
>
> Honor thy father and thy mother, that thy days may be long upon the land which the Lord thy God giveth thee.
>
> Thou shalt not kill.
>
> Thou shalt not commit adultery.
>
> Thou shalt not steal.
>
> Thou shalt not bear false witness against thy neighbor.
>
> Thou shalt not covet thy neighbor's house.
>
> Thou shalt not covet thy neighbor's wife, nor his manservant, nor his maidservant, nor his cattle, nor anything that is thy neighbor's.[25]

Besides the FOE monument, there are two others (a Revolutionary War Monument and a Freedom Monument), which are collectively referred to as the "War Memorial." At 295-96.

The plaintiffs do not contend there is excessive entanglement . As a result, the 7th Circuit looked at the first two prongs of the Lemon test to see if these circumstances constitute "endorsement."

---

[25]The 7th Circuit's opinion reprinted photographs of the monument itself and its location on the grounds of the Elkhart municipal building. See 235 F. 3d at 309-11. Also, one will note that there are more than ten (10) commandments listed. This is to accommodate various translations.

> As a starting point, we do not think it can be said that the Ten Commandments, standing by themselves, can be stripped of their religious, indeed sacred, significance and characterized as a moral or ethical document. Indeed, the Supreme Court made this point clear in *Stone v. Graham*, 449 U.S. 39, 101 S.Ct. 192 (1980), when it noted that a simple reading of the Ten Commandments does not permit us to ignore that they transcend 'arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. Rather, the first part of the Commandments concerns the religious duties of believers: worshiping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day.'" *Id*. at 41-42, 101 S.Ct. 192.

At 302. Notwithstanding the 7th Circuit's misgivings that the Decalogue could ever avoid a religious significance, the court added that a display of a religious symbol may, under certain circumstances, demonstrate a secular purpose. The Ten Commandments "no doubt played a role in the secular development of our society and can no doubt be presented by the government as playing such a role in our civic order." Id. The 7th Circuit noted Justice Stevens' opinion wherein he described the friezes on the walls of the U.S. Supreme Court. See *supra*. "A display is unconstitutional, according to Justice Stevens, only when its message, evaluated in the context in which it is presented, is nonsecular." At 303, internal punctuation omitted.

> Indeed, the Court in *Stone* [*v. Graham*] emphasized that the challenged statute that required the posting of the Ten Commandments on schoolroom walls did not present "a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like." 449 U.S. at 42.

Id. The context of a religious symbol is important in any constitutional analysis. "[R]eligious symbols should not be considered in the abstract; instead, courts must ask whether the particular display at issue, considered in its overall context, could be said to advance religion." Id., internal punctuation and citation omitted.

The 7th Circuit found the City of Elkhart made no significant attempt to present the text of the Ten Commandments in a manner that would have diminished the obvious religious character. Although the original reason for the monument and the city's acceptance of same bespeak of a secular purpose by creating a code of conduct for wayward youth, the code was also expected of the citizens. "The code chosen, however, was a religious code that focuses not only on subjects that are the legitimate concern of civil authorities, but also subjects that are beyond the ken of any government and that address directly the relationship of the individual human being and God." Id. As a consequence, the court determined that the display of the Ten Commandments was not secular, failing to satisfy the first prong of the Lemon test. At 304.

The court also found the display failed the second prong by having the principal effect of advancing

religion. Id. Relying on Allegheny County v. Greater Pittsburgh ACLU, see *supra*, the court, using context as affecting the message, explained why the nativity scene on the Grand Staircase violated the First Amendment but the menorah that was placed next to a 45-foot Christmas tree along with a sign that read "Salute to Liberty" did not.

> In fulfilling our responsibility to apply faithfully the Establishment Clause jurisprudence of the Supreme Court of the United States, we have subjected to particularly careful scrutiny displays at the seat of government. We have taken this course because an important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as disapproval, of their individual religious choices.

At 305, internal punctuation and citation omitted. The "symbolic union" occurred in this case because the monument is displayed at the seat of government (the municipal building grounds), which marks it "implicitly with governmental approval"; the granite monument is a permanent fixture on the grounds of the seat of government; the format of the monument does not dilute the religious message; and the placement of the American Eagle gripping the national colors at the top of the monument "hardly detracts from the message of endorsement; rather, it specifically links religion, or more specifically these two religions [Judaism and Christianity], and civil government." At 306-07.

Although the 7th Circuit reversed the district court and remanded the matter for further action, the 7th Circuit left the door open a bit.

> In crafting equitable relief to comply with our judgment today, the district court must ensure that, although the condition that offends the Constitution is eliminated, Elkhart retains the authority to make decisions regarding the placement of the monument. In making those decisions, Elkhart has the right and, indeed, the obligation to take into consideration the religious sensibilities of its people and to accommodate that aspect of its citizens' lives in a way that does not offend the strictures of the Establishment Clause.... Arriving at a realistic solution that comports with the strictures of the Establishment Clause will no doubt take some time, and the district court ought to ensure that Elkhart authorities have a reasonable time to address in a responsible and appropriate manner the task of conforming to the letter and spirit of the constitutional mandate.

At 307-08. On January 31, 2001, the 7th Circuit granted Elkhart's request for a stay of its order while the city seeks a writ of certiorari in the U.S. Supreme Court. The petition for a writ of certiorari was filed March 16, 2001 (Supreme Court Case No. 00-1407.)[26]

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[26]In an Associated Press dispatch in *The Indianapolis Star* under the headline "Commandments display picks up support" (April 14, 2001), Alabama's Attorney General, Bill Pryor, reported he had filed

After Legislative Enactment

As noted *supra*, the Indiana General Assembly passed P.L. 22-2000 during its 2000 session. This law, in part, permits Indiana public schools to post "[a]n object containing the words of the Ten Commandments" so long as this object was placed "along with documents of historical significance that have formed and influenced the United States legal or governmental system," and the object containing the Ten Commandments was not fashioned in such a way as to draw attention to it. A legislator had a monument prepared that would contain a version of the Ten Commandments similar to the one in Books v. Elkhart, *supra*, along with the Preamble to the 1851 Indiana Constitution, and the Bill of Rights. The monument was to stand on the south lawn of the State Capitol in Indianapolis. The south lawn contains a number of monuments to various Indiana, national, and historical persons and groups. A lawsuit was filed to enjoin the erecting of the monument on the south lawn.

As reported in the **Quarterly Report** April-June: 2000, the federal district court granted the plaintiffs' motion. See Ind. Civil Liberties Union, Inc., *et al* v. O'Bannon, 110 F.Supp.2d 842 (S.D. 2000). The State has appealed to the 7th Circuit. Oral arguments were conducted on January 9, 2001. Given the language in the 2-1 decision in Books v. Elkhart, it would appear unlikely the State will prevail.

But what happened to the monument? Unlike Books, there was no lengthy history involved such that the 7th Circuit was willing to permit the district court, in fashioning a remedy, to allow the city time and opportunity to remove the monument to some other location and in such a manner as to bring the monument within constitutional strictures.

The monument found itself back in Lawrence County where the legislator lives who sponsored its creation. The legislator, himself an attorney, prevailed upon the county commissioners to place the monument on the Lawrence County Courthouse lawn. The commissioners hastily erected the monument, but this did not stop the federal district court from ordering its removal.

In Kimbley v. Lawrence County, 119 F.Supp.2d 856 (S.D. Ind. 2000), Chief Judge Sarah Evans Barker (who also authored the ICLU v. O'Bannon decision *supra*) recited the history of the monument's travels. Following her decision in ICLU, the state legislator sought a temporary home for

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a "friend of the court" *(amicus curiae)* brief with the Supreme Court in support of the City of Elkhart. Attorney General Pryor filed the brief on behalf of Alabama, Mississippi, Nebraska, North Dakota, Ohio, South Carolina, Texas, and the Commonwealth of the North Marianas Islands. He characterized the legal attackes on the display of the Ten Commandments to the recent destruction of two historic Buddha statues in Afghanistan. "Just as these ancient statues of Buddha were declared to the 'shrines of infidels' and were demolished without regard to their historic and cultural value," he stated, "so do the plaintiffs in cases such as this seek to obliterate any artistic or historic representation with religious references."

the monument until the ICLU case was resolved.[27] The monument itself weighs about 11,500 lbs. The base is a rectangular block of limestone that is 6'7" wide, 4'7" deep, and 2'8" long. On top of the base sits a four-sided block that is tapered, with two large faces, each measuring 4'4" in height by 3'7" in width. The smaller faces are also 4'4" tall but are tapered from a width of approximately 2'6" at the base to 6" at the top.

The large surfaces on the top block are shaped like the tablets typically used to depict the Ten Commandments. The Decalogue language appears on one of the large surfaces and in all capital letters measuring 1" in height. The second large tablet-shaped face contains the Bill of Rights in letters that are engraved in all capital letters but measure only 5/8 of an inch each. One triangular face contains the Preamble to the Indiana Constitution of 1851, while the other triangular face identifies the industry donating the monument with the notation that "[t]his monuments replaces one donated by the Aeries and Auxiliaries of the Indiana Fraternal Order of Eagles on October 25, 1958." 119 F.Supp.2d at 861-62.

The court noted that the proposed location for the monument at the Lawrence County Courthouse would be the north side, where it would be the only monument on that side of the building. It would be located about six feet from the sidewalk that passes in front of the courthouse, and the side of the monument with the Decalogue would be facing toward the sidewalk and vehicular traffic. "There is no explanatory plaque or sign describing why the Monument is on the Courthouse lawn." At 862.

The County argued that the purpose for placing the monument there was "to display values common to the local community, including both secular and religious values." At 863. In addition, the monument promotes limestone, an important industry in Lawrence County. At 864.
The district court did not have the 7th Circuit's opinion in Books v. Elkhart, *supra*. It recited the usual grounds for analyzing Establishment Clause disputes (the three-prong Lemon test), but added that although a secular purpose need not be the exclusive purpose for government taking some action, such action "must be sincere and not a sham to avoid a potential Establishment Clause violation." At 865. Because of the "sham" potential, "courts have looked at both the context of the display as well as the content of the display to determine if the purpose is in fact secular." Id., citing to Allegheny Co. v. Greater Pittsburgh ACLU, *supra*. The court, as did the 7th Circuit in Books, noted that "the Ten Commandments is undeniably a sacred text" and that, with "the unambiguous religious nature of the Ten Commandments as our starting point, the County is obligated to articulate a valid secular purpose for the display of this sacred text." At 867.

The court found "dubious" the County's explanation for the appearance of the Bill of Rights along with the Decalogue.

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[27] Although this was suppose to be a temporary home for the monument, it apparently would have become a permanent home. Another monument would be made for the State Capitol, possibly because the original monument contains a spelling error.

> [S]uch a link between the religious values contained by the Ten Commandments and the principles embodied by the Bill of Rights is highly dubious, especially in light of the First Amendment's strong and clear testimony to the fact that, while the framers may very well have known of and been influenced by the Ten Commandments in their personal religious and spiritual lives, such personal religious influences were not allowed to preempt, negate, or otherwise supersede our national preference for secular governmental structures.

Id., internal punctuation and citation omitted. While the court acknowledged that promotion of local industry is a legitimate governmental concern and a valid secular purpose, the design and purpose of the monument were not for that purpose. The purpose was religious in nature. At 868.

The Ten Commandments are not physically or visually linked to the other texts on the monument but appear by themselves on one side and in lettering that is significantly larger than the lettering employed for the other texts and the dedication. When looking at the 7' tall monument, one would see only the Ten Commandments. Id. Accordingly, the purpose of the monument is religious and not secular, and thus violates the First Amendment.

The court also reviewed the second prong of the Lemon test to determine whether the governmental action had the principal or primary effect of advancing religion. Under this test, the court must determine whether the governmental action being challenged conveyed a message of endorsement or disapproval of religion. This is typically the "content" and "context" analyses that have grown from Supreme Court cases. The court concluded that "a reasonable person looking at this Monument would undoubtedly view it as an endorsement of religion." At 872. Although there are other monuments on the county courthouse lawn, there are no other monuments on the north side except the one in dispute. Its solitary position coupled with its location at the seat of county government enhances the imputed endorsement of religion. At 873.

The judge also expressed some pique at the county commissioners, who, although on notice of the pending litigation, "intentionally rushed to create a 'new status quo'" prior to the court enjoining any further activity. The commissioners, the court wrote, "acted in willful ignorance of their obligations" under state and federal law by trying to erect the monument and seal it to its base before the court could rule. Although one commissioner professed ignorance of the pending litigation, "it would be highly inequitable to allow a governmental body...to flaunt the authority of this court simply by claiming that the right hand did not know what the left hand was doing. Any harm imposed on the County by granting the Plaintiff's requested injunctive relief is therefore self-inflicted." At 875.

As a result, the Plaintiff's motion for preliminary injunction was granted. The county was ordered to remove the monument from the county courthouse grounds. The court allowed five business days for the removal, with fines of $1,000 a day thereafter against the county and $200 a day against the individual commissioners, as well as "any other individuals determined to be responsible for its removal." The latter reference was directed possibly at the persistent state legislator. Id. The court docket indicates the monument was removed by November 17, 2000.

COURT JESTERS: THE HOUND AND THE FURRY

There's just something about a boy and his dog. The dogs always seem to be hound dogs, and their names start off with "Old" or "Ole" or some such folksy appellation. There was "Old Yeller" (from the book by the same name, written by Fred Gipson) and "Old Dan"(from *Where the Red Fern Grows* by Wilson Rawls) and "Old Blue" from the well known folk song by the same name. All of these "Olds" have something in common: They die...horribly. (Old Yeller dies from rabies after being bitten by an infected wolf; Old Dan dies from injuries received from a mountain lion; Old Blue just dies.) Of course, there is some comfort in that all of these hound dogs died of natural causes.

But that's not what happened to "Old Queenie." This remarkable hound dog died–horribly, of course–but not by natural causes. She was done in by the Tennessee Valley Authority (TVA).

Tennessee Valley Authority v. Stratton, 209 S.W.2d 318 (Ky. 1948) involved "Old Queenie," described by the court as "a blueblooded bitch, a foxhound of the first water" who went hunting on TVA property on a Saturday night in May of 1946. "In the glory of this chase," the court wrote at 318, "the hound fell into an open well and was drowned." Even though "this hound was a good one, she had not been licensed." The owner admitted that the hound met her demise during the early hours of Sunday morning, an illegal time for hunting. Nevertheless, the trial court awarded Stratton $200 in damages for the loss of his foxhound. TVA appealed.

The court was not bothered by the fact that Stratton was hunting on Sunday, taking judicial notice (sort of) that a chase may continue during the "better part the entire night as frequently occurs in this pastime." The court was likewise willing to take notice that the hound was worth $200, a princely sum in 1946, notwithstanding the lack of a license.

> In the great fraternity of fox hunters, a man's hound is a pearl of considerable price. A common man may freely enjoy without tax or ticket the open air symphony of the melodious harmony of a pack of hounds on a cool, clear night and therein find that life is good if not somewhat glorious. He often recognizes the distinct voice of his own dog and takes pardonable pride in the leadership of that dog running out there ahead of all the rest. He does not need psychic power to know that "Old Queenie" is really leading the whole outfit. The hound that runs the bushytail with enthusiasm is just a little lower in the fox hunter's affections than his children.[28] And although habitual fox hunters toil but little and spin but spasmodically, yet Solomon in his palmiest days never had more of the wealth of real happiness than one of these fox hunters, a wealth to which the

[28]One's spouse is not mentioned. This may be an oversight. Maybe not.

> hound makes a mighty contribution.[29] Sometimes a man goes fox hunting just for the music, sometimes he goes for surcease from unhappy home life,[30] sometimes he goes in pure pride over the "best dog in the whole country." But under any of these conditions, the hound is worth its price, and there is always a ready market for the ugliest flop-ear that ever ran a ridge, provided it has the skill, staying qualities and power to deliver the goods in a real race.

At 319. Unfortunately, the judges had to follow the law, and the law was against Stratton in recovering his damages for the loss of "Old Queenie." As a result, the trial court judgment was reversed, and Stratton received the same thing the owners of Old Yeller, Old Dan, and Old Blue got–nothing, except fond memories of running the ridge with the ugliest flop-eared dogs ever created.

Doggone it anyway.

QUOTABLE...

> Any golfer in the rough of a hole which runs parallel to another should, as a matter of law, know the dangers of approaching golfers. To be surprised that approaching drivers hook or slice is akin to being surprised that not everyone shoots par. We have said often that "there comes a point where this Court should not be ignorant as judges of what we know as men [or women]."
>
> Judge John G. Baker, in a concurring opinion to Lincke v. Long Beach Country Club, 702 N.E.2d 738, 741 (Ind. App. 1998), *reh. den.* (1999), paraphrasing an Indiana Supreme Court case and two U.S. Supreme Court cases. Lincke (appropriately named) is yet another Indiana golfing case (see **The Golf Wars,** *supra*). This dispute arose when a golfer sued the country club after he was struck in the head by another golfer who sliced his shot from a parallel hole. The court found in favor of the country club, noting that the configuration of the parallel holes was not dangerous nor did the club have any knowledge that its layout was dangerous.

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[29]The reference to Solomon is somewhat troubling, given the previous footnote. Solomon was reported to have had numerous wives and dalliances, especially with the Queen of Sheba. None of this apparently is worth the value of good hound dog.

[30]See footnotes 28 and 29 *supra*.

Date: _____

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Kevin C. McDowell, General Counsel
Indiana Department of Education

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